DATE: May 25, 1994
CASE NO.: 93-ERA-30

IN THE MATTER OF

BENJAMIN YOUNG,
COMPLAINANT

V.

FLORIDA POWER & LIGHT COMPANY,
RESPONDENT.

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

On May 16, 1994, Complainant filed a Notice of Dismissal on the ground that it would be uneconomical to pursue both the instant proceeding under the employee protection provisions of the Energy Reorganization Act and a racial discrimination claim in the state courts. According to Complainant, seeking relief in the state court would be both more economical and would afford broader relief. Complainant would prefer an abatement or stay of this proceeding pending outcome of suit in the state courts. However, the same request as Complainant recognizes, was previously denied by the undersigned's order of March 10, 1994, attached hereto as Appendix A.

Clearly, Complainant has no intention of prosecuting his ERA claim at this time. He might at some indefinite date attempt to revive this proceeding, if unsuccessful in the state courts. Complainant's approach to this proceeding can, in the past year, at best be described as dilatory. (*See* Appendix B). The record compels the conclusion that Complainant will not prosecute the instant case. The case should be dismissed for lack of prosecution with prejudice.

Since Complainant requests dismissal of the proceeding and both parties have had an opportunity to brief the question of whether this case should be dismissed with prejudice, there is no need to issue an order to show cause pursuant to 29 C.F.R. § 24.5(f).

The Respondent's request for costs from March 10, 1994 will be denied. *See Malpass v. Genreal Electric Company*, Case Nos.

(March 1, 1994)) slip op p. 20 *et seq.*

_____
THEODOR P. VON BRAND
Administrative Law Judge

TPVB/jbm

[APPENDIX A]

DATE: March 10, 1994
CASE NO.: 93-ERA-30

IN THE MATTER OF

BENJAMIN YOUNG,
COMPLAINANT

V.

FLORIDA POWER & LIGHT COMPANY,
RESPONDENT.

ORDER DENYING MOTION FOR ABATEMENT

Pretrial Order No. 4 issued on March 3, 1994, in pertinent part providing as follows:

1. Discovery is to be completed by April 15, 1994.

2. The parties are to exchange witness lists, which are as definitive as possible, and telefax to the undersigned a joint deposition schedule on March 7, 1994.

[PAGE 3]

3. If there is a controversy concerning the deposition schedule, the parties are to arrange for a conference call on March 8, 1994.

On March 7, 1994, in the course of a telephone conference Complainant's counsel advised that he would seek dismissal of the proceeding because he intended to pursue alternative relief in the state court system and before the EEOC. Complainant's counsel at that time advised that he would telefax a document

withdrawing the complaint on March 8, 1994.

On March 9, 1994, Complainant filed a Request for Abatement Pending Decision on State Court Jurisdiction. As grounds, therefore, Complainant stated that seeking relief in the state court system would be more economic and afford broader relief than that available in the instant case. Complainant's counsel further advised, however, that the state court proceeding may be barred by the statute of limitations. Apparently, it is his intention to urge that the state suit is not time barred evidently on the basis of an equitable tolling theory. It is also evident from Complainant's motion that currently he has not yet filed a proceeding in the state court system and that he expects to obtain a right to sue letter from the EEOC in the future. In short neither proceeding is underway.

The request for abatement must be considered in the context of the prior delays frustrating the discovery process in this case. See Appendix to Pretrial Order No. 3 dated February 28, 1994. Further delays in the form of abatement cannot be justified considering the prior history of this proceeding. In any event, a stay in this proceeding is not warranted on the basis of proceedings in other forums which have not yet commenced. It should be noted, in this connection, that the chances of Complainant obtaining a favorable ruling on the statute of limitations issue in a future state court proceeding is at best problematic. Equally uncertain is the date on which this issue might be decided by the state court. The motion for abatement must be denied; granting it would subject this proceeding to an essentially open ended stay.

Respondent urges a dismissal. That request is premature at this time. Pretrial Order No. 4 is modified as follows:

1. Discovery is to be completed by April 15, 1994.

2. The parties are to exchange witness lists which are as definitive as possible and telefax to the undersigned a joint

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deposition schedule on March 16, 1994.

3. If ther is a controversy concerning the deposition schedule, the parties are to arrange for a conference call on March 17, 1994.

If the terms of this order are not complied with, then consideration may be given to a motion to dismiss for lack of prosecution, should one be filed. Accordingly,

IT IS ORDERED that Complainant's motion for abatement be, and it hereby is, denied.

IT IS FURTHER ORDERED that the parties are to complete discovery in accordance with the terms of this Order.

IT IS FURTHER ORDERED that the prior trial date of June 20,

1994 remains in effect.

_____
THEODOR P. VON BRAND
Administrative Law Judge

TPVB/jbm

[APPENDIX B]

APPENDIX

Summary of the record in *Young v. Florida Power & Light Co.*:
April 15, 1993:
Complainant filed a Complaint with the Department of Labor, Wage and Hour Division through his attorney, Debra S. Katz.

May 20, 1993:
Complainant's telegram was received appealing an adverse decision by the Wage and Hour Division.

May 26, 1993:
Notice of Hearing and Pretrial Order indicated that the hearing was set for June 21, 1993.

June 9, 1993:

[PAGE 5]
The hearing, originally set for June 21, 1993, was postponed at the Complainant's request, until further notice.

Complainant's deposition was scheduled for this date, and Complainant did not appear. Complainant's attorney said she would not be available for Complainant's deposition until mid-August.

June 15, 1993:
Complainant's counsel, citing a busy schedule, requested a postponement of the hearing until October 11 or 18, 1993.

July 1, 1993:
Second Notice of Hearing and Prehearing Order instructed that: [1] Complainant should make himself available for deposition for two days prior to August 20, 1993; [2] parties would conclude pretrial discovery by October 8, 1993; and [3] the hearing was scheduled for November 2, 1993.

July 8, 1993:
Respondent filed Notice that Complainant's deposition would be taken on August 4, 1993

August 6, 1993:
Notice of parties agreement that: [1] Claimant's depositin would be taken in the latter part of September; [2] all discovery would end by January 18, 1994; and [3] the hearing would commence on February 8, 1994.

October 21, 1993:
Respondent filed a Motion to Compel and the court issued an Order to Show Cause why Complainant should not be ordered to make himself available for deposition on November 10, 11, or 12, 1993.

October 26, 1993:
Complainant respondent to the Order to Show Cause by answering that [1] Complainant has moved to Buffalo, New York, and was seeking to locate new counsel; [2] new counsel would soon enter an appearance, but due to prior commitments was unable to prepare and defend Complainant's deposition; [3] Complainant's current counsel was out of the office and unable to prepare for or defend the deposition as scheduled; and [4] the depositin should be postponed for one month which would not prejudice the Respondent or require the hearing date to be moved from February 8, 1994.

[PAGE 6]
Respondent's Motion to Compel was denied by the Administrative Law Judge.

November 16, 1993:
Debra S. Katz withdrew as Complainant's counsel.

November 17, 1993:
A Notice of Appearance as counsel was filed by Michael R. Seward.

November 22, 1993:
Respondent filed a Request for Discovery Conference on the grounds that Complainant failed to respond to a Request for Production of Documents or to answer Respondent's Interrogatories, both of which should have been accomplished by November 15, 1993.

November 30, 1993:
Respondent filed a Motion to Compel Complainant to respond to its Request for Production of Documents and to answer Respondent's interrogatories.

December 3, 1993:
Complaiannt filed a Request to Enter Upon Land for Inspection and Other Purposes.

December 8, 1993:
The case was reassigned to Administrative Law Judge Theodor Von Brand.

December 21, 1993:

Complainant's Status Report indicated that Complainant would not be ready for trial on February 8, 1994, and that Complainant would need at least one year to conduct discovery and prepare for trial.

January 6, 1993:

The Respondent filed its objection to the Complainant's Request to Enter Upon Land, on the grounds that the request did not describe with particularity the areas or items to be inspected, measured, surveyed and photographed.

January 12, 1994:

Pretrial Order No. 1 instructed the parties that: [1] Complainant's deposition must be completed by February 4, 1994; [2] With regard to the Request to Enter Upon Land, Complainant must identify, no later than January 21, 1994, the areas he seeks to inspect more specifically, and Complainant must explain why access is necessary;[1] [3] discovery must be completed by March 31, 1994; [4] the trial in this matter is scheduled for June 20 through 24, 1994.

January 27, 1994:

Complainant's Motion for a one day extension of the deposition schedule was granted. Complainant's deposition was scheduled to be taken on February 5, 1994.

February 22, 1994:

Complainant indicated in a conference call that a continuance of the discovery schedule and hearing date is necessary. Due to his obligations in a case in Federal District Court, he might withdraw from this case unless a continuance of the discovery schedule and the hearing date is granted, because he would be unable to continue to effectively represent his client.

Pretrial Order No. 2 instructed the parties to file memoranda outlining their respective positions on the question of continuance, and reminded Counsel for Complainant to hold himself in readiness to proceed with the established schedule.

[ENDNOTES]

[1] To date, no response to this directive has been filed by the Complainant.